MEILEN PRESS INC — N. Y. C. 219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1914

Supreme Court, U. S.
FILED
MAY 11 1977
MICHAEL RODAK, JR., CLERK

JANE MONELL, *et al.*,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OSCAR CHASE
250 Joralemon Street
Brooklyn, N.Y. 11201

NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

GREGORY ABBEY
26 Court Street
Brooklyn, N.Y. 11242

Counsel for Petitioners

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, N.Y. 10019

Of Counsel

TABLE OF CONTENTS

page

TABLE OF CASES AND AUTHORITIES . . .iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT. 6

ARGUMENT

Introduction 12

I. A School Board is a "Person" Within the Meaning of Section 1983 13

II. The District Court Had the Authority to Direct the Individual Defendants to Provide Back Pay From Public Funds Under Their Control

A. The Decision Below Departed From Precedent by Establishing an Unauthorized Exclusion From the Scope of 42 U.S.C. Section 1983. . 32

B. Section 1983 Should be Read in Accordance With its Plain Language . . . 46

page

C. Fulfillment of the Central Purpose of Section 1983 Requires that Officials be Considered Persons When Sued in Their Official Capacity 50

D. The Eleventh Amendment "Analogy" Relied Upon by the Court Below is Unsound 57

III. The District Court Had the Power to Award Back Pay for Constitutional Violations Occurring After the Commencement of This Action. . 69

CONCLUSION 75

TABLE OF CASES AND AUTHORITIES

Case — Page

Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975) 55

Alexander v. Holmes County Board of Ed. 396 U.S. 19 (1969) 16

Andrews v. Drew Municipal Separate School District, 507 F. 2d 611 (5th Cir. 1975), cert. dismissed 425 U.S. 599. 20

Bell v. Hood, 327 U.S. 678 (1946) 36

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 16,18

Brenden v. Independent School Dist. 742, 477 F. 2d 1292 (8th Cir. 1973) 20

Brown v. Board of Education, 347 U.S. 483 (1954) 14,23,25

Burt v. Board of Trustees, 511 F. 2d 1201 (4th Cir. 1975) 33

Burton v. Cascade Union Dist. High School, 512 F. 2d 850 (9th Cir. 1975) 20

Bush v. Orleans Parish School Board, 365 U.S. 569 (1961) 16

Butz v. The Mayor and Alderman of the City of Muscatine, 75 U.S. 575 (1869) 67

Canton v. Spokane School Dist. No. 81, 498 F. 2d 840 (9th Cir. 1974) 20

Case — Page

Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969) 16,17

Chambers v. Hendersonville City Board of Education, 364 F. 2d 189 (4th Cir. 1966) (en banc). 20

City of Kenosha v. Bruno, 412 U.S. 507 (1973) 21,38,39,40,42

Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974) . . . . . .6,15,43,46,53, passim

Cohen v. Chesterfield County, 326 F. Supp. 1159 (E.D. Va. 1971), aff'd 414 U.S. 632 (1974) 43,44

Davis v. Bd. of School Commissioners, 402 U.S. 33 (1971) 18

East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). 14,15

Edelman v. Jordon, 415 U.S. 651 (1974) . . . . . .9,23,26,44,46, passim

Educational Association East v. Board of Education of Aurora, 490 F. 2d 431 (7th Cir. 1973) 20

Elrod v. Burns, 96 S. Ct. 2673 (1976) 54

Ex Parte Young, 209 U.S. 123 (1908) 59

Gierenger v. Central School Dist.No.58, 477 F. 2d 1164 (8th Cir. 1966) . . . 20

Case — Page

Divisich v. Marshall, 281 N.Y. 170 (1939) 29

George R. Whitten, Jr. Inc. v. State University, 493 F.2d 177 (1st Cir. 1974) 27

Goss v. Board of Education, 373 U.S. 668 (1963) 16

Green v. County School Board of New Kent County, 391 U.S. 439 (1968) 16,19

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 36

Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir., 1972) 20

Imbler v. Pachtman, 96 S.Ct. 984 (1976) 49

Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974). 33

Keyes v. School District No. 1, 413 U.S. 189 (1973) 15,19

Kramer v. Union Free School District, 393 U.S. 621 (1969) 16

Lanza v. Wagner, 11 N.Y.2d 317 (1962). 30

Lincoln County v. Lunning, 133 U.S. 529 (1890) 26

Case — Page

Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), cert. den. 400 U.S. 976 20

Lynch v. Household Finance Corp., 405 U.S. 538 (1972). 28,52,67

Marbury v. Madison, 1 Cranch (U.S.) 137 (1803) 36

Matthews v. Rodgers, 284 U.S. 521 (1932). 71

McNeese v. Board of Education, 373 U.S. 668 (1963). 15,52

Milliken v. Bradley, 418 U.S. 717 (1974). 16,27

Mitchum v. Foster, 407 U.S. 225 (1972). 46,48,51

Monroe v. Board of Commissioners, 391 U.S. 450 (1968). 16,19

Monroe v. Pape, 395 U.S. 167(1961) . . . . . 7,10,13,16,20 passim

Moor v. County of Alameda, 411 U.S. 693(1973) 14

Moore v. Board of Education of Chideston School District, 448 F.2d 709 (9th Cir. 1971) 20

Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) 20

Case — Page

Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) 33,41

Northcross v. City of Memphis Board of Education, 397 U.S. 232(1970) 15

Oliver v. Kalamazoo Board of Education, 508 F.2d 178(6th Cir. 1974), cert. den. 421 U.S. 963. 20

People ex rel Wells & Newton v. Craig, 232 N.Y. 125 (1922). 30,31

Raney v. Board of Education, 391 U.S. 443 (1968). 16

Rizzo v. Goode, 432 U.S. 362 (1972). 48,70

Rolfe v. County School Board of Education of Lincoln County, 391 F.2d 77 (6th Cir. 1968). 20

Runyon v. McCrary, 96 S.Ct. 2586 (1976) 24

Sampson v. Murray, 415 U.S. 61 (1974) 73

San Antonio School District v. Rodriguez, 411 U.S. 1 (1974). 16

School District of Abington Township v. Schempp, 374 U.S. 203 (1963). 15

Smith v. Board of Education of Morrilton School District, 365 F.2d 770 (8th Cir. 1966) 20

Case	Page
Sugarman v. Dougall, 413 U.S. 634 (1974)	54
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	15
Tinker v. Des Moines Independent School District, 393 U.S. 621 (1969)	15
Vlandis v. Kline, 412 U.S. 441 (1973)	42,46
Von Hoffman v. City of Quincy, 71 U.S. 535 (1867)	67
Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3rd Cir 1976), aff'd 45 U.S.L.W. 4378.	15,20
Wood v. Strickland, 420 U.S. 308 (1975)	53
Younger v. Harris, 401 U.S. 37 (1971).	70

Statute or Amendment

20 U.S.C. 1617	22
20 U.S.C. 1703	24
20 U.S.C. 1706	24
20 U.S.C. 1708	24
28 U.S.C. 1331	16,67
28 U.S.C. 1343	4

Statute or Amendment	Page
42 U.S.C. 1981	16
42 U.S.C. 1983	4,5,6,7,8 passim
42 U.S.C. 2000d	24
42 U.S.C. 2000e	4,24
Eleventh Amendment	45,57,58,59
Fourteenth Amendment	35
N.Y. Education Law 2551	27
N.Y. Education Law 2554	28
N.Y. Education Law 2576	29
N.Y. Education Law 2580	30
N.Y. Education Law 2590	28

Congressional Reference

Cong. Globe, 42nd Cong., 1st Sess.	62,63,64,65
117 Cong. Rec. 11522	22
H.R. 159, 92nd Cong., 1st Sess. (Section 1207)	21
H.R. 13534, 92nd Cong., 2nd Sess	21
H.R. Rep. No. 94-1588	23
S. Rep. No. 94-1011	23
Sherman amendment	61,62,66

Other Authorities

Page

"Board of Education to Sue City for Funds Under Stavisky Law" New York Times, 4/30/77 29

Federalist Papers, The, Nos. 47 & 48. 48

Frankfurter, "Some Reflections on the Reading of Statutes", 47 Col. L. Rev. 527 (1947) 47

"Landmarks of Legal Liberty" The Fourteenth Amendment 2, Schwartz,ed..55

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75 - 1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court certifying this is a class action is reported at 356 F. Supp. 1051 (S.D.N.Y. 1972). Petition, pp. A1-A14. The opinion of the district court dismissing this

action is reported at 394 F. Supp. 853 (S.D.N.Y. 1975). Petition, pp. A15-A27. The opinion of the United States Court of Appeals for the Second Circuit, is reported at 532 F. 2d 259 (1976). Petition, pp. A28-A70.

JURISDICTION

The Second Circuit rendered its judgment affirming the dismissal of this action on March 8, 1976 and entered its order on the same date. An extension of time within which to file this petition to July 9, 1976 was granted by Mr. Justice Marshall on May 25, 1976. Certiorari was granted on January 25, 1977. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 1983, 42 U.S.C., provides:

> Every person who, under color of any statute, ordinance, regulation,

> custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION PRESENTED

Are local governmental officials and/or local independent school boards "persons" within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

STATEMENT OF THE CASE

The plaintiffs in this action are female employees of the New York City Department of Social Services and of the New York City Board of Education suing on behalf of themselves and other similarly situated female employees of the Board

and City. The defendants are the Board of Education of the City of New York and the Chancellor thereof, the Department of Social Services and Commissioner thereof, and the Mayor. The gravamen of the complaint is that the defendants compelled pregnant female employees to take unpaid leaves of absence before medical reasons required them to do so.

This action was commenced on July 26, 1971, alleging that the disputed policies violated the Fourteenth Amendment. Jurisdiction was alleged to exist, inter alia, under 42 U.S.C. § 1983 and 28 U.S.C. §1343(3).*/ Plaintiffs sought both

*/ The complaint was amended on September 14, 1972 to add a cause of action under the then newly amended provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e. The District Court held the 1972 amendments to Title VII, applying that provision to state and local governments, did not provide a remedy for acts of discrimination occurring prior to the date of that amendment. Petition, A25-A26. The Court of Appeals affirmed

injunctive and monetary relief. On January 29, 1972, New York City put into effect a change in policy permitting a pregnant employee to remain on the job so long as she was in fact able to continue to perform her job. This new policy governed the Department of Social Services but not the independent Board of Education. On April 12, 1972, the District Court denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to certify this as a class action. In November of 1973 the Board of Education adopted new by-laws, retroactive to September 1, 1973, permitting pregnant

*/ continued

this holding. Petition, A37-A43. Certiorari was sought with regard to this aspect of the decision below, Petition, pp. 14-23, but certiorari was limited to the question regarding §1983. 45 U.S.L.W. 3058.

female employees to remain on the job so long as they were actually able to perform their duties. On January 21, 1974, this Court decided Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), holding invalid under the Fourteenth Amendment pregnancy regulations similar to those of the instant defendants.

On April 30, 1974, the district court concluded that plaintiffs' injunctive claims were moot, and dismissed plaintiffs' claim for back pay for lack of subject matter jurisdiction. On March 8, 1976, the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

The Court of Appeals held in this case that no monetary relief was available under 42 U.S.C. Section 1983 against the Board of Education of the City of New York, or its Chancellor, or officials

of the City of New York who had effected the unconstitutional acts at issue. The court reasoned that to allow such monetary relief would frustrate the ruling of Monroe v. Pape, 365 U.S. 167 (1961) that a city was not a "person" within the meaning of section 1983. Petitioners urge that this reasoning is unsupportable and that the ruling of the court below extends the relevant holding of Monroe in a manner contravening the language, purpose, and legislative history of section 1983. Petitioners' view is supported by the weight of this Court's decisions relating to school boards and to errant municipal officials.

As to school boards, it should be noted that in the long line of cases dealing with school desegregation -- some of which had a far greater financial

impact than is contemplated here -- jurisdiction rested on section 1983. This Court clearly would not have effected the far reaching changes involved in those cases had subject matter jurisdiction been lacking, i.e., had school boards not been "persons" for the purposes of section 1983. Congress, moreover, has subsequently manifested its approval of this line of cases and its interpretation of section 1983. Even if the Reconstruction Congress had intended to exclude school boards from the ambit of section 1983, which it did not, the subsequent reliance by Congress on a contrary determination by this Court ought not be disturbed now.

As to the defendant officials, petitioners would have the Court note that they do not assert that New York City is liable for all violations of its employees, but only

that officials who have used their powers to violate the Constitution can be compelled to use those same powers to remedy the violation. This Court has approved such decrees in several cases decided after Monroe, and the court of appeals wrongly rejected those authorities. The lower court sought to harmonize its result with the well established doctrine allowing suits in equity against named officials by creating an arbitrary and, in this context, wholly new distinction between types of equitable relief, viz., allowing only that which does not call for monetary restitution. The court of appeals supported this new approach by analogizing section 1983 to the Eleventh Amendment as construed in Edelman v. Jordan, 415 U.S. 651 (1974), A55-A60.

This superficially appealing analogy does not withstand analysis in depth -- for it ignores the very different legislative purposes underlying the two laws. The central purpose of the Eleventh Amendment was to insure that the federal courts would not impose liability on the states in suits by citizens. In contrast, the primary purpose for which section 1983 was enacted was to ensure appropriate remedies for wrongful acts under color of law, manifestly including wrongful acts by local officials, Monroe v. Pape, supra, 365 U.S. at 171, 173.

The legislative history of section 1983, held in Monroe v. Pape, supra at 187-192, to indicate an exclusion by Congress of municipalities from the word "persons" does not justify an extension of Monroe's exclusion to the situation

presented here. The Sherman amendment would have made cities liable even for civil rights violations committed within their borders by persons who were not city officials. It was rejected for various reasons but prime among them was the recognition that many cities did not enjoy, under state law, the police powers necessary to control those violations. Thus the rejection cannot support an interpretation of section 1983 which would frustrate its central purpose and violate its plain language.

Finally, since, from the time of filing of the complaint, the district court had the power to grant a preliminary injunction providing full prospective relief, Congress could not have intended to foreclose the less drastic remedy of appropriate monetary relief.

ARGUMENT

Introduction

The question presented by this case raises three distinct though closely related legal theories.

We contend, first, that a school board is a "person" within the meaning of section 1983. If the Court concludes that it is, relief would be possible on remand to three of the named plaintiffs and that portion of the plaintiff class, perhaps half, that work for the Board of Education.

We urge, second, that an official who withholds wages in violation of the constitution can be compelled in a section 1983 action to provide back pay out of the public funds under his control and from which those wages were originally due. Should the Court hold

that such relief is possible, back pay will be available on remand to all the named plaintiffs and class members.

Finally we maintain that a district court can award monetary relief in a section 1983 action for injury sustained between the filing of the complaint and the granting of final injunctive relief. Such a remedial authority, if upheld, would cover all the named plaintiffs but only a small fraction of the plaintiff class.

We brief each of these legal theories in turn. The second, if resolved in our favor would obviate the need for resolution of the other two.

I. A School Board Is A "Person" Within The Meaning of Section 1983

The only question presented and decided in Monroe v. Pape was that "Con-

gress did not undertake to bring municipal corporations with the ambit" of section 1983. 395 U.S. at 188. This conclusion was based on the rejection by Congress of the Sherman amendment rendering cities and counties liable for certain acts of violence by private individuals committed within their jurisdiction. Because counties were also included within the defeated amendment, Moor v. County of Alameda, 411 U.S.693, 708-710 (1973), held that counties were also not subject to suit under section 1983. The court below extended Monroe to hold that the defendant Board of Education was not a "person", and suggested that virtually any public body should enjoy a similar imunity.

From Brown v. Board of Education, 347 U.S. 483 (1954) to East Carroll Parish School Board v. Marshall,424 U.S.

636 (1976),*/ this Court has entertained and decided on the merits nineteen actions commenced under section 1983 in which the primary defendant was a school board. In numerous other instances,the Court has dealt summarily with such cases. Of the Court's written opinions eight involved actions in which section 1983, together with 28 U.S.C. §1343, was the sole basis of jurisdiction alleged,**/ while in eleven cases an-

*/On April 19, 1977, Vorchheimer v. School District of Philadelphia, a section 1983 action, was affirmed by an equally divided court. 45 U.S.L.W. 4378.

**/East Carroll Parish School Board v. Marshall, supra (The intervenors complaint also alleged a violation of the Voting Rights Act; the Court rejected this claim on the merits but upheld the constitutional claim under section 1983); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Keyes v. School District No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Northcross v. City of Memphis Board of Education, 397 U.S. 232 (1970); Tinker v. Des Moines Independent School, 393 U.S. 621 (1969); District of Abington Township v. Schempp, 374 U.S. 203 (1963); McNeese v. Board of Education, 373 U.S. 668 (1963).

other federal cause of action was also alleged.*/ All but one of these decisions occurred after the decision in Monroe and five of them were handed down after City of Kenosha v. Bruno, 412 U.S. 507 (1973). All of them involved constitutional issues which, under the practice

*/ Milliken v. Bradley, 418 U.S. 717 (1974) (42 U.S.C. §2000d; jurisdiction was also alleged under 28 U.S.C. §1331, which provides jurisdiction to enforce the Fourteenth Amendment); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); San Antonio School District v. Rodriguez, 411 U.S. 1 (1974) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); Kramer v. Union Free School District, 395 U.S. 621 (1969) (42 U.S.C. §1983); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) (42 U.S.C. §1981) (nine cases); Carter v. West Feliciana Parish School Board, 396 U.S. 226, 290 (1969) (42 U.S.C. §1981) (thirteen cases); Green v. County School Board of New Kent County, 391 U.S. 430 (1968) (42 U.S.C. §1981); Monroe v. Board of Commissioners, 391 U.S. 450 (1968) (42 U.S.C. §1981); Raney v. Board of Education, 391 U.S. 443 (1968) (42 U.S.C. §1981); Goss v. Board of Education, 373 U.S. 668 (1963) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); Bush v. Orleans Parish School Board, 365 U.S. 569 (1961) (42 U.S.C. §1981, 28 U.S.C. §1331 and §1343).

of this Court, not only can but should be avoided if the action can be disposed of on another basis.

The court of appeals dismissed such decisions of this Court on the ground that there were also individual defendants in each case, and intimated that these individuals were the defendants with which the Court was really concerned and that its failure to dismiss as to the defendant school boards was, at best, not a "reasoned determination." Petition A51-A53. In fact, however, this Court's opinions involved repeatedly emphasized that it was the school board which had violated the constitution and was subject to an appropriate remedial order. In Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969), the Court entered a stay directing the

boards and the boards alone to take specified action.*/ In Bradley v. Richmond School Board, 416 U.S. 696 (1974), the Court described that case, which had twice before been resolved here on its merits,**/ as "a class action under the Civil Rights Act of 1871, 42 U.S.C. §1983" "against the School Board of the City of Richmond, Virginia." 416 U.S. at 699. In Davis v. Board of School Commissioners, 402 U.S. 33, 35 (1971), the Court affirmed an order of the Fifth

---

*/ "Petitioners' application for a temporary injunctive order requiring the respondent school boards to take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, is granted .... (3) By way of interim relief pending further order of this Court, the respondent school boards are directed to take no steps which are inconsistent with, or which will tend to prejudice or delay, a schedule to implement on or before February 1, 1970, desegregation plans submitted by the Department of Health, Education, and Welfare for student assignment simultaneous with the other steps ordered by the Court of Appeals." 396 U.S. at 228.

**/ 382 U.S. 103 (1965); 412 U.S. 92 (1973).

Circuit "directing the District Court to require the board to establish a faculty and staff ratio in each school substantially the same as that for the entire district." In Keyes v. School District No. 1, 413 U.S. 189 (1973) the Court detailed at length the burden of proof and constitutional obligations to be met by the "respondent School Board" on remand. 413 U.S. at 213-14. In Green v. School Board of New Kent County, 391 U.S. 300 (1968) the Court directed that "The Board must be required to formulate a new plan and . . . . fashion steps which promise realistically to convert to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. See also Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968).

In light of this series of deci-

sions nearly every court of appeals has entertained actions under section 1983 against school boards for a wide variety of constitutional violations.*/ Four of those circuits ordered or upheld awards of back pay against school boards after, and notwithstanding, Monroe.**/ Since

*/ Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976); Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2nd Cir. 1974), cert. den. 400 U.S. 976; Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3rd Cir. 1976), aff'd 45 U.S.L.W. 4378; Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed 425 U.S. 599; Oliver v. Kalamazoo Board of Education, 508 F.2d 178 (6th Cir. 1974), cert. den. 421 U.S. 963; Educational Association East v. Board of Education of Aurora, 490 F.2d 431 (7th Cir. 1973); Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973); Canton v. Spokane School District No. 81, 498 F.2d 840 (9th Cir. 1974).

**/ Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966) (en banc); Rolfe v. County School Board of Education of Lincoln County, 391 F.2d 77 (6th Cir. 1968); Gierenger v. Central School District No. 58, 477 F.2d 1164 (8th Cir. 1973); Smith v. Board of Education of Morrilton School District, 36 F.2d 770 (8th Cir. 1966); Burton v. Cascade Union District High School, 512 F.2d 850 (9th Cir. 1975); Moore v. Board of Education of Chideston School District, 448 F.2d 709 (9th Cir. 1971).

City of Kenosha, however, considerable confusion has arisen among the lower courts on this issue. Petition 26-27.

This long history of decisions in this and other courts upholding section 1983 actions against school boards is important, not only because of its precedental significance but also because Congress has for more than 23 years since Brown refused to overrule these cases. On repeated occasions members of Congress have proposed, and the Congress has refused to adopt, legislation expressly limiting the ability of the federal courts to issue remedial orders to a "school board" in a desegregation case.*/ Instead of disapproving section 1983 actions against school boards, Congress has adopted several measures premised on the assumption that such litigation

*/ See, e.g. H.R. 13534, 92d Cong., 2d Sess. (§2922); H.R. 159, 92d Cong., 1st Sess. (§1207).

was and would continue to be proper. Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. §1617, provides in part:

> Upon the entry of a final order by a court of the United States against a local Educational agency . . . for discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis supplied)

Awards were authorized against such school boards because Congress recognized, in the words of the Senate sponsor, that "in most instances the suit is brought against the local school board."*/ Similarly, when Congress modified section

*/ 117 Cong. Rec. 11522 (remarks of Sen. Cook).

1988 to authorize counsel counsel fees in litigation to enforce, inter alia, section 1983,*/ the House Report cited Brown v. Board of Education, 347 U.S. 483 (1954), as the sort of case in which fees could be awarded,**/ and the Senate Report noted that under section 1983 and the other statutes the defendants "are often state or local bodies."***/

Because these past decisions involve the construction of a statute, rather than of the constitution, and because Congress, while clearly cognizant of them, has chosen not to overturn them, it would be inappropriate to overrule them even if this Court now thought them erroneous. Edelman v. Jordan, 415 U.S. 651, 671, n. 14 (1974). Adherence

*/ Public Law 94-559.

**/ H.R. Rep. No. 94-1558, pp. 4-5.

***/ S. Rep. No. 94-1011, p. 5.

to this construction of section 1983 is particularly appropriate because, regardless of whether it may "accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." Runyon v. McCrary, 96 S. Ct. 2586, 2604 (1976) (Stevens, J., concurring). Within the last decade Congress has adopted legislation reiterating the existence of a federal cause of action against a school board eo nomine for discrimination in the treatment of either students*/ or staff.**/

That school boards have been treated as "persons" subject to suit under section 1983 is entirely consistent with the legislative history of that provision.

---

*/ 20 U.S.C. §§1703(a)(b)(c) and (e), 1706, 1708.

**/ 20 U.S.C. §1703(d); 42 U.S.C. §2000e (as amended in 1972). Both types of discrimination are also made actionable by 42 U.S.C. §2000d.

The rejected proposal of Senator Sherman dealt solely with imposing liability on cities and counties for unlawful conduct by private individuals, and was not concerned with public entities generally. See Monroe v. Pape, 365 U.S. at 188, n. 38. In the southern states with which the Reconstruction Congress was particularly concerned, education in the years after the Civil War was a private matter. As this Court noted in Brown v. Board of Education, 347 U.S. 483, 489-90 (1954),

> In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent . . . It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on northern states was generally ignored in the Congressional debates. Even in the North the conditions of public education did not approximate those existing today.

Thus while Congress was not, and could not have been, concerned to place schools outside the definition of "person," discrimination therein, although actionable under section 1981, would not have been reached by section 1983 since such action was not under color of law.

While school boards are now public entities whose actions are subject to the Fourteenth Amendment, that fact alone does not warrant treating them in the same manner under section 1983 as Monroe holds was intended for cities and counties. This Court long ago rejected the suggestion that the protection of the Eleventh Amendment be extended to all governmental units merely because established, related to or funded in part or whole by the state. Edelman v. Jordan, supra, 415 U.S. at 667, n. 12 (1974); Lincoln County v. Lunning, 133 U.S. 529 (1890). The special status of a city or county under Monroe only extends to another governmental entity which is merely an agent or "alter ego" of the city or county. See George R. Whitten, Jr., Inc. v. State University, 493 F. 2d 177, 179-180 (1st Cir. 1974). School boards in the United States, however, have traditionally been uniquely autonomous entities. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

The status of the New York City Board of Education is typical. The Board is created by virtue of state law, not local ordinance, and has its own corporate existence.*/ Of its 7 members, the mayor

---

*/ N.Y. Education Law, §2551. Petitioners acknowledge that in their complaint they erroneously characterized the Board of Education as a department of the city government. Amended complaint, ¶21, A 11. That error, however, does not alter the Board's actual status as an independent corporate body established by the state.

appoints two, and each of the five borough (county) presidents appoints one.*/ The members serve for fixed terms and are not subject to the control or supervision of the mayor, borough presidents, or city council; their powers and duties are established by the state legislature.**/ Thus in the instant case, when the mayor decided to alter the city policy regarding pregnant employees, the Board was under no obligation to alter its practices and in fact continued to remove such employees for another year and a half. The city, Board and governor regularly disagree on public policies and funding decisions, lobby against one another in the legislature, and sometimes even bring

---

*/ N.Y. Education Law, §2590-b(1)(a).

**/ N.Y. Education Law, §2554.

suits against each other.*/ The Board is not entirely funded by any one source, but receives substantial sums for the city, the state, and the federal government. The city is required by state law to appropriate for the board, to use as it pleases,**/ a share of the estimated yearly budget; it cannot appropriate less and need not appropriate more.***/ That share is not insubstantial, exceeding $1 billion.****/ Although the city comptroller also serves as the treasurer for the Board, and holds all Board funds, those funds must be disbursed "by

---

*/ "Board of Education to Sue City for Funds Under Stavisky Law," New York Times, 4/30/77, pp. 112-13.

**/ Divisich v. Marshall, 281 N.Y. 170, 173-74 (1939).

***/ N.Y. Education Law §2576(5).

****/ See footnote */ above.

authority of the board of education upon written orders . . . signed by the superintendent of schools and the secretary of the board of education or such other officers as the board may authorize."*/ The city serves solely "as custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disperse the same according to the instruction of the Board of Education." People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. 125, 137 (1922). The Board brings and defends litigation at its own initiative and in its own name, and has repeatedly been characterized by the highest state court as "an independent corporation separate and distinct from the city."**/ The New York Court of

*/ N.Y. Education Law, §2580.

**/ Lanza v. Wagner, 11 N.Y. 2d 317, 326 (1962); People ex rel. Wells & Newton Co. v. Craig, 232 at 135.

Appeals has expressly relected the assumption of the Second Circuit that the city is the real party in interest in an action against the Board.*/

In sum the New York City Board of Education, like most other boards, has a significant relationship with the city, the five counties therein, the state, and the federal government, but is in no sense an alter ego of any one of them. Under these circumstances it would be entirely inappropriate to confer upon the Board the protection from suit under section 1983 which Monroe concluded Congress intended for cities and counties. Since the Board is thus a person within the meaning of section 1983, those named plaintiffs and members of the plaintiff class employed by the Board can sue the Board as such for any appropriate relief.

*/ People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. at 136.

II. The District Court Had The Authority To Direct The Individual Defendants To Provide Back Pay From Public Funds Under Their Control

A. The Decision Below Departed From Precedent By Establishing An Un-Authorized Exclusion From The Scope of 42 U.S.C. §1983.

Petitioners maintain that, where a public official exercises the powers of his office to inflict a constitutional injury, the federal courts, having jurisdiction over that official by virtue of section 1983, can require him to exercise the powers of his office to remedy that injury. Where, as here, that injury included an order by the individual defendants that the plaintiffs not be paid their normal salary merely because they were pregnant, the defendants can, and under ordinary circumstances must, be directed to countermand their original decision and direct payment of compensation for that period.

The court of appeals appears to have misunderstood our argument, and the decisions of other appellate courts awarding back pay in section 1983 actions, */ to suggest that money judgments could be obtained against a city, to the same extent that would have been the case were cities "persons" under section 1983, merely by seeking such an award against any city official in his "official capacity." Petition, A60. The construction of section 1983 advanced by us, and adopted by a number of lower courts, seeks no such rejection of Monroe, and is applicable only under certain narrow circumstances. We contend

---

*/ The courts of appeals have been divided on the issue. Compare Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc) (no monetary award against officials) with Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975) (school board members held subject to back pay awards in their official capacities) and Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 287-288 (6th Cir. 1974) (award of counsel fees against a sheriff sued in his official capacity held proper).

only that the city official who committed the constitutional violation, and who is thus a proper party defendant in a section 1983 action, must use all his official powers to remedy that violation. Such a rule will only entail monetary relief where the defendant who engaged in the violation was the chief executive or policy making body of the city or county, or some other high ranking official authorized to direct the expenditure of funds. The primary application of this construction will be in instances where, as here, the highest officials of a city or county adopt or effect an official policy directing, in violation of the constitution, that money be taken or withheld from the aggrieved plaintiffs. In such a case section 1983 provides the federal courts with power to order the errant official to invoke his official

power to restore funds unlawfully withheld.

This issue, we contend, goes to the remedial authority of a court under section 1983, not to its jurisdiction. It is not denied that the district court in this action had jurisdiction over both the persons of the mayor and other individual defendants, and over the subject matter of the action, an alleged violation of the Fourteenth Amendment. Absent some special constraint the federal court would have plenary authority to order the individuals to take any action within their legal and physical ability to remedy the constitutional violation which occurred. The question presented is whether section 1983 was intended to limit the ordinary remedial power of the federal courts over such defendants.

Since Marbury v. Madisen, 1 Cranch (U.S.) 137, 162, 163 (1803), "it has been the rule . . . that the court will be alert to adjust their remedies so as to grant necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946). In Griffin v. School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court rejected an attempt to limit the ability of the federal courts in section 1983 actions to redress violations of federal law.

> The District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial

> discrimination a public school system in Prince Edward County like that operated in other counties in Virginia. (Emphasis added).

Where, as here, it is within the authority of the defendants to provide the plaintiffs with the back pay required to fully remedy the unlawful conduct, the district court can compel them "to exercise the power that is theirs." In the instant case, where the violation alleged is constitutional in nature, a statutory limitation on the remedial authority of the federal courts would itself pose serious constitutional questions, and such a limitation should not be inferred, and the resolution of such questions required, unless Congress has indicated an unequivocal intent to interfere with the normal remedial powers of the courts.

In holding that officials of local governments and school boards were not subject to an award directing them to

restore back pay to the petitioners, the Second Circuit created an exception to the coverage of section 1983 which finds no support in the decisions of this Court. Monroe v. Pape, 365 U.S. 167 (1961), does not support respondent's position. In Monroe the Court held that the word "person" did not include the City of Chicago. 365 U.S. at 191. It reached this conclusion in a kind of afterward to its central holding that a police officer acting in violation of the Fourteenth Amendment while clothed with municipal authority was liable under the statute: "The City of Chicago asserts that it is not liable under [§1983]. We do not stop to explore the whole range of questions tendered us on this issue at oral arguments and in the briefs." Id. at 365 U.S. 187.

Nor does City of Kenosha v. Bruno, 412 U.S. 507 (1973) support the decision

below. In that case the majority opinion carefully noted that:

> The only defendants named in the complaints, however, were municipalities of Kenosha and Racine.
> Id. at 412 U.S. 512

In his concurrence, Mr. Justice Brennan also stated the issue narrowly:

> Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U.S.C. §1343 . . .
> 412 U.S. at 516

On a deeper level, City of Kenosha demonstrates the inapplicability of the exclusion doctrine created by the Second Circuit, for the basic holding of Kenosha was that a section 1983 action would not lie against a municipality regardless of the type of the relief sought. Yet the Second Circuit held that these defendants could be sued for equitable or declaratory relief but not

monetary relief, Petition, A53-A68.*/ Thus the court was simultaneously holding that it was--and was not--bound by the doctrine of Monroe v. Pape and City of Kenosha v. Bruno. The Second Circuit reached this impasse in its effort to resolve obviously competing claims. On one hand there is the language and purpose of section 1983 which calls for effective protection of federal rights. On the other there is the Monroe-Bruno doctrine excluding actions against municipalities. Petitioners contend that these tensions are

*/Even assuming the validity of the court of appeals' approach, other forms of equitable relief were available which, though not affording complete redress, should have been adopted, e.g., the award of compensatory time off with pay in lieu of back pay for those members of the class who were still employed by the defendants. The court of appeals also ignored the claims to non-monetary relief of those class members who had lost seniority rights or salary steps as a result of their involuntary maternity leave. See Brief of Appellants in the Court of Appeals at 5.

more logically resolved by permitting relief requiring the defendant officials to use their power to remedy their own wrongs, rather than characterizing this suit as one essentially against the entities employing them and trying, however awkwardly, to fit it under cases applicable to municipalities.*/

Although this Court has not squarely decided this issue it has on three

*/ The unsettling consequences of this approach are illustrated by Muzquiz v. City of San Antonio, 528 F. 2d 499 (5th Cir. 1976) (en banc), rev'g 520 F. 2d 993 (5th Cir. 1975), a case in which the plaintiffs sought monetary restitution for money they had paid into a municipal pension fund. The divided en banc court held that the pension fund board of trustees was not a §1983 "person"; that the members of the board, in their official capacities, were not "persons" insofar as plaintiffs sought restitution from the fund; and that, indeed, the official-capacity board members were not even "persons" insofar as declaratory and injunctive relief were requested, because such relief would constitute "in substance a determination of plaintiffs' entitlement to restitution from the fund itself." 528 F. 2d at 501.

occasions indicated that monetary restitution under the narrow circumstances here present are proper. In Vlandis v. Kline, 412 U.S. 441 (1973), a section 1983 action, decided the same day as City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Court held unconstitutional Connecticut's irrebutable presumption that the plaintiffs were not residents of Connecticut and thus subject to the higher tuition and fees charged to non-residents attending the University of Connecticut. The district court, which has reached a similar conclusion regarding the merits, had directed the University's Director of Admissions to refund to the plaintiffs "the amount of tuition and fees paid in excess of the amount paid by resident students," 412 U.S. at 445; this Court affirmed that order, 412 U.S. at 454.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), this Court held unconstitutional the defendants policy of compelling pregnant female employees to cease working for a total of at least eight months. The district court, which had also held that policy unlawful, directed that the defendant board and superintendent of schools in that section 1983 action restore the plaintiff to "the same position she would have been in had she been allowed to teach," such relief to include "recovery of her salary for the months [when she was suspended], seniority to which she is entitled, and any and all other rights and benefits she would have received had she been teaching during that period." Cohen v. Chesterfield County School Board, 326 F. Supp. 1159, 1161 (E.D. Va. 1971). This Court,

in upholding the action of the district court, characterized its remedial order as "appropriate relief," 414 U.S. at 638.

In Edelman v. Jordan, 415 U.S. 651 (1974), the plaintiffs sued, under section 1983, the director of the Illinois Department of Public Aid, and other individuals, urging that they had administered the federal-state programs of Aid to the Aged, Blind, Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The defendants did not contest in this Court the findings below that they had acted unlawfully, but urged that the Eleventh Amendment constituted a bar to an order directing them to restore to plaintiffs benefits which would have been paid had they acted in compliance with the federal regulations. Five members of the

Court thought it necessary to reach the constitutional issue, seeing no bar to such awards in section 1983 itself, and found that the Eleventh Amendment prohibited such awards where the funds were to be paid out of the state treasury. 415 U.S. at 657-678. Four members of the Court, also finding no inhibition in section 1983, concluded that the Eleventh Amendment did not bar such an award, and would have affirmed the order of the Seventh Circuit directing the individual defendants to restore retroactively the assistance benefits unlawfully withheld. Justice Marshall, in a dissenting opinion joined by Justice Blackmun, noted that "Congress intended the full panoply of traditional judicial remedies to be available to the federal courts in these §1983 suits." 415 U.S. at 691. Although

the Court was sharply divided as to the meaning of the Eleventh Amendment, no member of the Court thought that there was any statutory inhibition against the award there sought.

Even if the Court does not feel bound by the decisions regarding §1983 in Vlandis, La Fleur, and Edelman because the results were reached there without discussion, it is nonetheless true that, as the Court observed in another §1983 case, ". . . it is in the shadow of those cases that the question must be decided," Mitchum v. Foster, 407 U.S. 225, 231 (1972).

B. Section §1983 Should Be Read In Accordance With Its Plain Language.

Section 1983 contains no express limitation on the remedial authority of a federal court over defendants, such as

natural persons, who are subject to suit. On the contrary, that section provides in broad terms that a defendant who has violated any of the substantive provisions referred to "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The defendant officials are indisputably covered by the plain language of §1983: All of them are clearly "persons." That statutory language is normally determinative is axiomatic under our system of legislative democracy. */ Were this not so, the power entrusted by

*/ As Mr. Justice Frankfurter once put it:

> A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. -Frankfurter, "Some Reflections on the Reading of Statutes," 47 Columbia L. Rev. 527 (1947).

the people to Congress could be subtly assumed by the judicary or the executive.**/ Naturally, therefore, this rule of construction has been used repeatedly by this Court in resolving doubts about the scope of §1983.

In holding that §1983 was an exception to the federal anti-injunction act this Court noted that Congress "...plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a 'suit in equity' as one means of redress," Mitchum v. Foster, 407 U.S. 225, 242 (1972). So too was the language determinative when the question was whether §1983 protected property rights as well as personal rights, Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972). And in Rizzo v. Goode, 96

**/ See generally The Federalist Papers, Nos. 47 and 48.

S. Ct. 598, 604 (1976), the Court relied upon "the plain words" of the statute in determining the scope of its applicability.

In the rare instance in which this Court has interpreted §1983 at variance with its own words, Imbler v. Pachtman, 96 S. Ct. 984 (1976), the conclusion --that §1983 did not abolish a prosecutor's common law immunity from civil liability-- was compelled by the vital public interest at stake and by the clear weight of legal history,*/ factors which here weigh in petitioners' favor.

---

*/ Compare the concurring opinion of Mr. Justice White in Imbler v. Pachtman, supra, at 96 S. Ct. 996:

> "As the language itself makes clear, the central purpose of 42 U.S.C. §1983 [is to provide a remedy against] 'an official's abuse of his position.'" (Emphasis in original)

C. Fulfillment Of The Central Purpose Of §1983 Requires That Officials Be Considered Persons When Sued In Their Official Capacity.

The central purpose of §1983 has not been a matter of disagreement: it was to provide a federal remedy for persons deprived of federal rights by persons exercising the authority of local government. Mr. Justice Frankfurter, in his dissent in Monroe v. Pape, summed up his view of the meaning and purpose of the statute:

> Section 1 [of the Ku Klux Act of 1871] aimed at another evil, the evil not of combinations dedicated to purposeful and systematic discrimination, but of violation of any rights ... secured by the constitution through the authority, enhanced by the majesty and dignity, of the States. Here it was precisely this authorization, this assurance that behind a constitutional violation lay the whole power of the State, that was the danger. 365 U.S. at 257.

This view of §1983 and its predecessors was of course accepted by the majority

in Monroe, which built on that foundation to include coverage of wrongs committed by officials in violation of local law.*/ In construing the reach of §1983 this court has again and again used this central purpose as a touchstone.

In Mitchum v. Foster, 407 U.S. 225 (1972), for example, the question was whether §1983 was an exception to the federal anti-injunction statute. Holding that it was, the Court stated that §1983 was enacted for the "express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment,'"**/ and that the statute was, like the Amendment, directed "'against State action, ... whether that

---

*/ Monroe v. Pape, supra at 365 U.S. 173. See also concurring opinion of Mr. Justice Harlan, Id. at 194, 195, 201.

**/ 407 U.S. at 238.

action be executive, legislative or judicial.'"*/ Were it not interpreted to include authority to enjoin pending State proceedings, reasoned the Court, it could not serve one of the ends for which it was enacted.

Here, by contrast, the court of appeals lost sight of the vital center of the statute and interpreted it so as to frustrate its primary goal. The core allegations of the complaint in this action state that the plaintiffs were deprived of their employment as a direct consequence of policies adopted by, and/or effected by the Mayor of the City of New York, the Commissioner of Social Services, and the Chancellor of the Board of

*/ 407 U.S. at 240 (emphasis in original deleted). See also Lynch v. Household Finance Corp., 405 U.S. 538(1972); McNeese v. Board of Education, 373 U.S. 668 (1962).

Education.*/ If, as must be accepted at this stage of the litigation, plaintiffs' allegations that they were suspended pursuant to those policies because they became pregnant are true, then they have been penalized for exercising what this Court has included "among the basic civil rights of man," Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974). Yet if the decision below is allowed to stand, the plaintiffs will be left without recourse. They can obtain relief against the defendants neither in their official capacities nor in their individual capacities, for plaintiffs have not alleged that defendants acted maliciously or in bad faith.**/ Plaintiffs

*/ Compare the situation in Monroe v. Pape, supra, in which liability was sought to be imposed on the City of Chicago in consequence of acts committed by police officers in total disregard of local law.

**/ Individual liability would be appropriate only if one of these two tests could be met, Wood v. Strickland, 420 U.S. 308, 322 (1975).

are thus caught between doctrines which threaten to strip section 1983 of much of its force as a remedial statute, even in situations in which the violation is effected through the "majesty and dignity" of local law.

The denial of relief to plaintiffs is unfortunate for them, but, more important here, it has grave consequences for the status of a broad range of constitutional rights traditionally protected by §1983. These include freedom of speech,[*] equal protection of law[**] and due process of law.[***] If reversal is not forthcoming,

[*] Elrod v. Burns, 96 S. Ct. 2673 (1976)(relief pursuant to §1983 granted to victim of politically motivated dismissal).

[**] Sugarman v. Dougall, 413 U.S. 634 (1974)(municipal official ordered, pursuant to §1983, not to discriminate against aliens in employment).

[***] Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)(school officials ordered not to arbitrarily suspend pregnant teachers).

it is predictable that future violations will go unremedied. The victims of the wrongs will, in effect, have had no constitutional protection:

> It was early recognized in England that high-sounding pronouncements of personal liberties are hollow when no enforcement role is given to an effective and independent court system.[*]

We can, moreover, predict an increase in constitutional violations, for by immunizing public officials from the threat that budgets under their control will be made available to make whole the victims of unconstitutional policy decisions an important incentive to forbear such policy making will be eliminated.[**]

[*] Mr. Justice Brennan, "Landmarks of Legal Liberty," The Fourteenth Amendment 2, Schwartz, Ed. (1970).

[**] See Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975)(deterrent effect of back pay emphasized).

Although recognizing the unfairness of its denial of monetary relief to the plaintiffs, Petition 68A-70A, the court of appeals felt constrained to so hold because of an analogy it found between section 1983 and the Eleventh Amendment, an analogy which plaintiffs contend is without foundation.

D. The Eleventh Amendment "Analogy" Relied Upon By The Court Below is Unsound.

The court below, although recognizing that the Eleventh Amendment was not itself applicable, found an Eleventh Amendment "analogy" which prohibited monetary awards under Sec. 1983 against "persons" which would be payable from the treasury of municipalities which are not "persons.." Petition A68-A70.

This analogy is far less compelling than the court below thought it, and not alone because it overlooks that the very case upon which it relies, Edelman, found no such limitation inherent in Sec. 1983. See supra at 44. The analogy breaks down for the following additional reasons:

The Eleventh Amendment and Sec. 1983 are not parallel provisions adopted to accomplish identical objectives, one as to

states and the other as to municipalities. On the contrary, their origins and purposes are entirely different, indeed quite contradictory, so that there is no justification for transporting principles developed under one by "analogy" to the other.

The Eleventh Amendment was a negative provision, designed to withdraw from the federal courts a power which they were then exercising: the power to enforce monetary judgments against state treasuries. The Amendment's very purpose would have been undermined if such relief could be obtained through suits against state officials. However, as the wording of the Eleventh Amendment (withdrawing jurisdiction to entertain any suits against states) was broader than its purpose (to prevent suits for monetary

judgments), this Court has always recognized that suits might be brought against state officials for relief which impacts upon the state so long as the result is not a judgment for monies to be paid from the state treasury. Ex parte Young, 209 U.S. 123 (1908). From this evolved the line between prospective and retroactive relief articulated in Edelman, which the court below has now read into Sec. 1983 as controlling in suits affecting municipalities not protected by the Eleventh Amendment.

But Sec. 1983, unlike the Eleventh Amendment, was not a negative provision designed to withdraw federal power. On the contrary, it was an affirmative provision, creating a cause of action for victims of constitutional violations to recover complete relief from "every

person" -- a designation which, as the court below recognized, includes public officials in their official capacities. By its terms, it imposes no restrictions upon the relief obtainable in suits against "persons," and its purpose would be entirely undermined were the federal courts unable to direct officials to make whole the victims of constitutional violations committed by them.

The court of appeals, however, believed that a congressional intent to deny such relief could be found in the failure of Congress to include cities and counties among the "persons" subject to suit under Sec. 1983, Petition, A56-A60. The decision below misreads both the legislative history of Sec. 1983 and this Court's decision in Monroe v. Pape. In that case, this Court relied upon Congress'

rejection of the Sherman Amendment in 1871 for its conclusion that municipalities were excluded from Sec. 1983, Monroe v. Pape, supra, 365 U.S. at 188-192. But the rejection of the Sherman Amendment could lend support to the result below only if Congress was manifesting a desire to insulate municipal treasuries from monetary relief even where such insulation would negate the reasons for the enactment of Sec. 1983. A review of the legislative history shows, to the contrary, that other considerations -- some having to do with substantive dissatisfaction with the Sherman Amendment itself, and some having to do with a perceived want of constitutional power in Congress to impose policing obligations upon municipalities-- account for that Amendment's defeat. That history will not support a finding that

Congress desired to insulate municipal treasuries, and thus does not sustain an inference that Congress intended to limit the remedies obtainable against public officials.

The Sherman Amendment was not rejected because of a general desire to immunize all public funds from liability. The Republicans who defeated the Amendment in the House, */ and whose opposition

---

*/ The Sherman Amendment was initially rejected by the House, Cong. Globe, 42nd Cong., 1st Sess. at 725, and rejected again by a vote of 106-74 in the House when reintroduced by the Conference Committee, Id. at 800-801. Republican defectors accounted for its defeat, as the bill was ultimately adopted by a vote of 93-64, with the margin of passage including the votes of many who had voted against the Amendment. Id. at 808. The Democrats, who voted against section 1983 both with and without the Sherman amendment, advanced other arguments grounded on their view that the national government could not and should not interfere with discrimination by local officials. Since that view was not controlling in the decision on the amendment, it is not controlling here.

ultimately led to its rejection, were concerned primarily with the fact that the amendment imposed vicarious liability on cities and counties for individual acts of lawlessness occurring within their borders, which they lacked the legal authority to prevent. */ For example, Representative Willard, a Republican, argued, inter alia,

> . . . the Constitution has not imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its

---

*/ The imposition of vicarious liability was a feature of the Amendment as originally proposed, Cong. Globe, 42nd Cong., 1st Sess. at 603, and as reported by the Conference Committee. Id. at 749.

boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States. */

Representative Burchard urged:

> [W]here a State imposes a duty upon county officers or State municipal corporations, the exercise of which is necessary to give effect to judgments or decrees of the United States courts, the latter can enforce the performance of that duty. In other words, where by the laws of a State the board of supervisors of a county or the common council of a city, are authorized to levy a tax and collect funds to pay a judgment, for the purpose of enforcing satisfaction of the judgment,

---

*/ Id. at 791.

the United States court, by mandamus can compel those State officers of a municipal corporation, to perform that duty.

But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations. Hence it seems to be that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance. */

The point then was one of fairness. Why should municipalities be liable for wrongdoing which only their parent states had legal authority to control? But to

---

*/ Id. p. 795. See also Id. at 794 (remarks of Rep. Poland), Id. at 795 (remarks of Rep. Blair).

leap from the articulated intent to avoid that unfairness to an assumption that Congress also intended to avoid a remedy requiring officials to use their official powers to right a wrong which municipal authority alone empowered them to inflict is illogical.

To read the rejection of the Sherman Amendment as manifesting the intent here disputed is dubious also because the Congress of the period manifested a very different mind in its other actions regarding federal judicial power. Had Congress been concerned with protecting city treasuries as such, it would doubtless have acted to limit the diversity jurisdiction of the federal courts, under which, in the years after the Civil War, this Court and numerous lower courts had

compelled cities to levy taxes and pay out large sums of money on city bonds and other obligations. See, e.g. Von Hoffman v. City of Quincy, 71 U.S. 535 (1867); Butz v. The Mayor and Alderman of the City of Muscatine, 75 U.S. 575 (1869). Far from seeking to restrict such litigation to enforce the Contract Clause, Congress in 1875 adopted the predecessor of 28 U.S.C. Sec. 1331 establishing federal question jurisdiction and greatly increasing the number of instances in which such judgments against cities could be obtained.*/

The legislative history of Sec. 1983 thus provides no basis for disregarding the unequivocal and broad remedial authority conferred by the language of the

---

*/ Lynch v. Household Finance Corporation, 405 U.S. 538, 548 (1972).

statute over defendant individuals. If, as was held in Monroe, Congress merely elected not to exercise its power to include cities and counties within the definition of "persons" liable to suit under Sec. 1983, that decision did not restrict the power of federal courts to require other and proper defendants to exercise "the power that is theirs" to remedy violations for which they are responsible.

III. The District Court Had The Power To Award Back Pay For Constitutional Violations Occurring After The Commencement of This Action

As the court of appeals correctly recognized,*/ the federal courts have unrestricted authority in an action under §1983 to award appropriate injunctive relief. This remedial power extends to preliminary injunctions and temporary restraining orders, as well as final injunctions. See Edelman v. Jordan, 415 U.S. 651, 656 (1974). Thus in a section 1983 action a district court has the power to afford complete relief, by way of injunction, for a violation occurring or continuing after the date on which the action was commenced. Having conferred upon the federal courts authority to remedy through an injunction pendente lite violations occurring or continuing between

*/ Petition, A53-55.

the filing of the complaint and the entry of final relief, Congress cannot have intended to foreclose to the Courts the less drastic and less burdensome option of permitting the disputed conduct to continue until final judgment and then awarding appropriate monetary relief for intervening injury.

The granting of a federal injunction against a state or local government, interfering with its normal operations, has traditionally been regarded as a remedy not lightly undertaken within our federal system. Rizzo v. Goode, 423 U.S. 362, 378-79 (1976); Younger v. Harris, 401 U.S. 37, 44-45 (1971). When the injunction is interlocutory in nature, the consequences can be even more serious, since there is usually no way to redress retrospectively any interim problems it may cause the defendants

if they ultimately prevail on the merits. Thus if in an employment discrimination case a federal court orders pendente lite that state or city officials hire or retain members of an alleged class, a subsequent decision on the merits that those class members were unqualified will only recognize, but could not remedy, difficulties occasioned by that interlocutory order. The out-of-pocket expense to a defendant of such interim injunctive relief will often exceed the monetary award where the plaintiffs are successful; that expense will always exceed the city or state's liability where the plaintiffs ultimately do not prevail. It is for such reasons that the equitable remedy of injunction has traditionally been unavailable where an adequate remedy at law for damages existed. Matthews v. Rodgers,

284 U.S. 521 (1932). In this and other litigation under §1983 it would, under ordinary circumstances, be a far less harsh interference with local prerogatives and principles of federalism to permit the defendants to continue, at their peril, the disputed practice, and provide appropriate monetary relief after the merits of the case were finally resolved. That is the approach that one would expect public defendants to prefer, and which, were monetary relief sufficient, equity would require. It is difficult to believe that Congress, in adopting section 1983, intended to restrict the federal courts to the form of relief for such an interim period which entailed the maximum interference with state and local officials.

A prohibition against the award of monetary relief for violations occurring

or continuing after the commencement would render irreparable virtually all injuries allegeable in a section 1983 action, and thus drastically expand the types of cases in which interim injunctive relief would be manadatory. In Sampson v. Murray, 415 U.S. 61, 88-91 (1974), this Court concluded that the unwarranted dismissal of a federal government employee would not ordinarily inflict irreparable injury, and thus necessitate the granting of a preliminary injunction, since full monetary relief would be available under the Back Pay Act if the employee were ultimately to prevail. If, as the court below held, no such monetary relief is ever available in a section 1983 action, all dismissals would necessarily involve irreparable injury; indeed, the holding below mandates the conclusion that any monetary injury in a

section 1983 case is irreparable. Such a rule would substantially increase the number of instances in which preliminary relief would be warranted and indeed required in civil rights litigation. Faced with such a proscription no conscientious attorney would fail to seek a temporary restraining order or preliminary injunction in a section 1983 case, or, if initially rebuffed, to renew that request repeatedly, since every day without preliminary relief would be another day of injury without a remedy. This restriction would thus obstruct the normal management of litigation and substantially increase the burdens on the federal courts as well as on the defendants.

However this Court may read the legislative history and purpose of section 1983, it is clear that prohibiting the

courts to grant monetary relief for violations occurring or continuing after the commencement of an action will tend to increase, rather than reduce, the burdens on state and local officials and treasuries. Congress could not have intended such a self-defeating result.*/

CONCLUSION

For the above reasons the decision of the Court of Appeals should be reversed and the case remanded for the entry of appropriate relief.

Respectfully submitted,

OSCAR G. CHASE
250 Joralemon Street
Brooklyn, New York 11201

---

*/ The monetary relief available under this argument would not be limited, as under our first argument, to actions against school boards; or, as under our second, to actions against policy making officials.

NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

JACK GREENBERG
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York,N.Y.10019

Of Counsel

GREGORY ABBEY
26 Court Street
Brooklyn, N.Y. 11242

Counsel for Petitioners